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No. 84-1259

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE DOW CHEMICAL COMPANY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE MOUNTAIN STATES LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether the Federal Government's aerial surveillance and photographing of an open-air commercial facility violates the Fourth Amendment.

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STATEMENT OF INTEREST [1]

For nearly two decades this Court has zealously guarded the constitutional right of the American business community to be free from unreasonable government inspections of its commercial facilities. In *See* v. *City of Seattle*, this Court held that:

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable entries upon his private commercial property. The businessman, too, has

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[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 36.2. The parties' consent letters have been filed with the Clerk of this Court.

> that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

387 U.S. 541, 543 (1967). This constitutional principle was reaffirmed in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978), where the Court held that a warrantless administrative inspection under the Occupational Safety and Health Act, 29 U.S.C. § 667 (1970), violated the Fourth Amendment. In so doing, the Court said "it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence." 436 U.S. 307, 312 (1978).

The Sixth Circuit decision to allow the Environmental Protection Agency ("EPA") to conduct aerial surveillance of open-air commercial facilities without judicial oversight violates privacy rights traditionally afforded to businesses. This decision deprives companies of any assurance that their secured open-air facilities are protected from aerial intrusions, and thereby threatens the basis of our free enterprise system. On behalf of the businesses they represent, the Chamber of Commerce of the United States ("Chamber") and the Mountain States Legal Foundation ("MSLF" or "Foundation") respectfully urge this Court to reverse the decision below, which strips open-air commercial facilities of their Fourth Amendment protections by characterizing them as "open fields."

The Sixth Circuit's extension of the "open fields" doctrine to commercial facilities has far-reaching consequences for all businesses subject to government inspections. Numerous industries operate in the open-air because of economics, worker safety, or the nature of the business itself. Many chemical plants install critical aspects of their facilities out-of-doors. Petroleum and iron and steel operations also take place outside. The automobile industry conducts road tests on outdoor

tracks. All of these industries exclude the public from their facilities to protect trade secrets and the results of their research and development programs. If the decision below is upheld, these industries will be forced to take drastic steps to preserve their Fourth Amendment rights.

The Chamber and the Foundation are well-suited to present the broad spectrum of business interests affected by this case. Together, they represent member companies in these and other industries interested in protecting corporate privacy from the dangerous erosion of the Fourth Amendment approved by the Sixth Circuit. As the largest federation of business and professional organizations in the United States, the Chamber's membership includes more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. The Foundation is a nonprofit, membership, public interest law firm dedicated to defending and preserving individual liberties, private property rights, and the private enterprise system. Both the Chamber and the Foundation regularly represent their members' views in court on issues of national significance and, in fact, filed as *amici curiae* in support of the Petition for Certiorari in this proceeding.

STATEMENT OF THE CASE

This case arises out of a lawsuit filed by The Dow Chemical Company ("Dow") against the Environmental Protection Agency ("EPA") for taking aerial photographs of its 2000-acre manufacturing facility in Midland, Michigan, without judicial oversight, for use as evidence in an impending enforcement action under the Clean Air Act. 42 U.S.C. § 7401 (1983). The photographs captured in detail the interior regions of Dow's open-air plant, revealing valuable trade secrets.[2] Dow

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[2] None of the photographs revealed any Clean Air Act violations. Yet skilled technicians, working with high resolution equipment,

[Continued]

sought injunctive relief and a declaratory judgment that EPA's aerial surveillance of the facility violated its Fourth Amendment right to be free from unreasonable searches and seizures.

The District Court found that Dow had a reasonable expectation of privacy in the open-air interior regions of its plant,[3] and held that EPA's aerial activities violated the Fourth Amendment. The United States Court of Appeals for the Sixth Circuit reversed, holding that the Dow plant was not protected by the Fourth Amendment because it was an "open field" within the meaning of this Court's decision in *Oliver* v. *United States*, —— U.S. ——, 80 L. Ed.2d 214 (1984).

SUMMARY OF ARGUMENT

The "open fields" doctrine was first established in *Hester* v. *United States*, 265 U.S. 57 (1924),[4] where the Court held that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to open fields." 265 U.S. at 59. Lower courts have applied the open

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[2] [Continued]
can read aerial photographs like a blueprint of the plant, and determine the configuration of technical process equipment, and the types and quantities of products being manufactured and inventoried on site. *See, E.I. duPont De Nemours & Co.* v. *Christopher*, 431 F.2d 1012, 1013-1014 (5th Cir. 1970), *cert. denied*, 400 U.S. 1024, *rehearing denied*, 401 U.S. 967 (1971).

[3] The District Court was "struck by the vivid detail and resolution" of the photographs which made it "possible to discern equipment, pipes and power lines as small as ½ inch in diameter." It noted that "[m]any of these minute, but observable items are located in *interior* regions of the plant which are surrounded by buildings and other structures which make observation from anywhere but *directly above*, a near physical impossibility." Petitioner's Appendix ("Pet. App.") at B-3 (emphasis in the original).

[4] The issue in that case was whether revenue officers who observed the defendant in possession of moonshine whiskey while hiding on his land conducted a warrantless search in violation of the Fourth Amendment.

fields doctrine predominantly in cases involving investigations of illegal activities on agricultural or undeveloped property.

This Court decided *Oliver* just last term to "clarify confusion that has arisen as to the continued validity of the [open fields] doctrine." 80 L. Ed.2d at 214. The Sixth Circuit's characterization of an outdoor manufacturing facility as an "open field" misapplies this Fourth Amendment concept, and undermines the Court's efforts to clarify the scope of the doctrine. As a result, the Sixth Circuit decision threatens the very essence of commercial privacy, and should be reversed.

The record in this case compels the conclusion that Dow's open-air but fully secured manufacturing facility is not an open field within the meaning of *Oliver*, and therefore is entitled to Fourth Amendment protection. Dow manifested an actual expectation of privacy in its open-air facility, as evidenced by its extensive plant security system and strict control over cameras and photography on site. Moreover, society, by virtue of long-standing precedent, recognizes commercial privacy and the right of companies to protect their trade secrets.

ARGUMENT

I. THE OPEN FIELDS EXCEPTION TO THE FOURTH AMENDMENT DOES NOT APPLY TO COMMERCIAL FACILITIES, AND BY NECESSITY DOES NOT APPLY TO AERIAL PHOTOGRAPHS OF OPEN-AIR COMMERCIAL FACILITIES.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV. The purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).

The decisions of this Court firmly establish that Fourth Amendment protection extends to business premises as well as homes. *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338 (1977); *See* v. *City of Seattle*, 387 U.S. 541 (1967). By characterizing Dow's manufacturing plant as an "open field," the Sixth Circuit stripped it of all Fourth Amendment protection, giving the government a carte blanche to conduct aerial surveillance of all open-air commercial facilities. The Sixth Circuit's holding and its result is unsupported in law and contrary to public policy.

This Court's reaffirmation of the open fields doctrine in *Oliver* in no way supports the Sixth Circuit's decision that Dow's open-air manufacturing plant is an "open field." A secure and developed commercial facility has never been held, by this Court or any lower court, to be an open field.[5]

The Fourth Amendment does not apply to open fields because no right of privacy can be reasonably expected

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[5] The open field cases cited in the Government's Brief in Opposition do not support the Sixth Circuit decision. *See United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981) (aerial surveillance of marijuana smuggling operations in a "secluded area"); *United States* v. *DeBacker*, 493 F. Supp. 1078 (W.D. Mich. 1980) (aerial surveillance of marijuana growing on a farm located in a sparsely populated area of the state characterized as "boondocks"); *United States* v. *Hensel*, 699 F.2d 18 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983) (surveillance of marijuana smuggling operations on the high seas); *United States* v. *Lace*, 669 F.2d 46 (2d Cir.), *cert. denied*, 459 U.S. 854 (1982) (surveillance of marijuana smuggling operations on property "clearly visible from the road" and observable by "outsiders who 'could enter the property at will'"); *United States* v. *Minton*, 488 F.2d 37 (4th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (observation of illicit whiskey from an embankment looking down over residence and storage building). *Amici*'s own legal research has not found a single case in which a developed commercial facility was deemed to be an open field.

there. *United States* v. *Freie*, 545 F.2d 1217 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). Since *Hester*, the application of the open fields doctrine has been limited generally to rural, agricultural lands.[6] The areas surveyed in *Oliver* were marijuana patches grown on a farm over a mile from the residence and in the woods behind the residence, and were observed by police from the ground. The Court found those areas to be "open fields" within the meaning of *Hester* because they were "rural" [7] and "by their very character as open and unoccupied, are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment." [8] None of the descriptions used by this Court to illustrate the scope of the open fields doctrine remotely resembles the Dow facility at issue here.[9] In fact, in explaining why Fourth Amendment protection does not extend to open fields, this Court emphasized the difference between a commercial facility and an open field:

> . . . [O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the

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[6] Most open field cases involve the discovery of marijuana growing in secluded areas. *See, supra* note 5; *see also, Gibbens* v. *State*, 156 Ga. App. 258, 274 S.E.2d 595 (1980), *cert. denied*, 450 U.S. 1026 (1981); *People* v. *Lashmett*, 71 Ill. App.3d 429, 389 N.E.2d 888 (1979), *cert. denied*, 444 U.S. 1081 (1980).

[7] *Oliver*, 80 L.Ed.2d at 224.

[8] *Id.* at 225, n. 10.

[9] "One need only think of the vast expanse of some western ranches or of the undeveloped woods of the Northwest . . ." *Id.*; "It is clear . . . that the term 'open fields' may include any unoccupied or undeveloped area outside the curtilage . . . For example, . . . a thickly wooded area . . . may be an open field as that term is used in construing the Fourth Amendment." *Id.* at 225, n. 11; "Most of the many millions of acres that are 'open fields' are not close to any structure . . . ." *Id.* at 226, n. 12.

> privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police *in ways that* a home, *an office or commercial structure would not be.*

Id. at 224 (emphasis added).

While there is no societal interest in protecting the activities that occur in open fields, society does have an interest in protecting the activities occurring in commercial settings. "The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is . . . based upon societal expectations that have deep roots in the history of the [Fourth] Amendment." *Id.* at 224, n. 8.[10] Aerial surveillance of commercial facilities offends these traditional notions of corporate privacy, and must be limited by the Fourth Amendment.

II. AERIAL PHOTOGRAPHS CAPTURING THE DETAILS OF OPEN-AIR COMMERCIAL FACILITIES CONSTITUTE UNREASONABLE SEARCHES UNDER THE FOURTH AMENDMENT.

Since it is inconceivable that a manufacturing facility is an open field, then EPA's aerial surveillance of the Dow plant is not exempt from the Fourth Amendment prohibition against unreasonable inspections. In *Camara*

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[10] Society also has an interest in protecting business' right to protect its trade secrets. The common law rights of privacy recognize a cause of action against any third party that might try to photograph Dow's plant. *See,* Restatement of Torts, § 757(a) ("[t]he law . . . protects the holder of a trade secret against disclosure or use when knowledge is gained, not by the owner's volition, but by some 'improper means'") (*quoted in Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 475-476 (1974)). And, this Court, itself, has at least twice disapproved the acquisition of trade secrets by industrial espionage. *See, Kewanee Oil Co., supra; E.I. duPont De Nemours & Co.* v. *Christopher,* 431 F.2d 1012 (5th Cir. 1970), *cert. denied,* 400 U.S. 1024, *rehearing denied,* 401 U.S. 967 (1971).

v. *Municipal Court*, this Court held that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." 387 U.S. at 528-529. The Court decided *See* v. *City of Seattle* on the same day, extending the rule of *Camara* to inspections of commercial facilities, and holding that "administrative entry, without consent, upon the portions of commercial premises which are not open to the public can only be compelled through prosecution or physical force within the framework of warrant procedure." 387 U.S. at 545. The Court upheld the applicability of the warrant clause to administrative inspections in *Marshall* v. *Barlow's, Inc.*, stating:

> The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative offices, particularly those in the field, as to where to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. These are important functions for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to inspections for compliance with regulatory statutes.

436 U.S. at 323-324. (citations omitted). The Clean Air Act satisfies these objectives of judicial oversight under § 113(b)(4) of the Act, by requiring EPA to obtain a civil injunction whenever a company refuses an inspection request. 42 U.S.C. § 7413(b)(4).

The Sixth Circuit recognized the applicability of the *Barlow* decision to the case below when it stated that "[i]f the government action in this case—EPA's aerial

photography of Dow Chemical's Midland, Michigan plant —constitutes a Fourth Amendment 'search,' then *Barlow's* controls, and EPA's warrantless search violated Dow's Fourth Amendment rights." Pet. App. at A-5. The Sixth Circuit determined, however, that no search had occurred.

According to the two-part test for determining what constitutes a search, the party claiming Fourth Amendment protection must demonstrate, first, an actual (subjective) expectation of privacy and, second, that expectation must be one that society recognizes as reasonable. *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The Sixth Circuit does not dispute that Dow exhibited an actual expectation to be free from ground-level intrusions.

> Here Dow had an actual expectation of privacy in certain parts of its plant, privacy which included the freedom from certain kinds of intrusion. Dow took great pains to be free from ground level intrusion by building a perimeter security fence and employing security guards. 536 F. Supp. at 1364-65. Hence, Dow had a kind of actual privacy expectation in these parts of its plant, a privacy interest to be free from ground level intrusions from the street.

Pet. App. at A-8. Nevertheless, the court held that EPA's aerial photography of the Dow plant was not a "search" because Dow showed no actual expectation of privacy from *aerial* intrusions.

A. Dow Manifested A Reasonable Expectation of Privacy Against Photographic Intrusions.

The government action at issue in this case is EPA's aerial *photography* of Dow's plant, not mere unaided observation of "outdoor spaces between plant buildings," as contended by the Sixth Circuit. Pet. App. at A-4. These photographs depict details of the plant that were

not visible to the naked eye, and by their very nature were capable of being enlarged for further study.[11]

In addition to preventing unauthorized ground level entry, Dow also takes great pains to protect its plant from being photographed by unauthorized personnel. EPA was well aware of this policy against unauthorized photography, since its intention to take pictures of the plant was the very reason expressed by Dow for denying the second inspection request. And, it was in the context of taking photographs that the possibility of getting a warrant was discussed.

While the Sixth Circuit concedes that "no one could reasonably expect Dow to build a dome over its entire Midland plant," it offers no reasonable alternative to the precautions already taken by the company to protect its premises from being photographed. Pet. App. at A-8. The court's suggestion that Dow could have "shielded the critical spaces in between its buildings," mischaracterizes the privacy interest at issue here, namely, the configuration of its equipment, pipes and powerlines. *Id.* Moreover, the Sixth Circuit's decision fails to appreciate the economics of operating open-air commercial facilities. The Sixth Circuit creates an artificial distinction between the roofed and open portions of the manufacturing facility. Such a distinction is inherently unworkable because the open-air equipment is an integral part of the activities that occur in the contiguous buildings. Dow clearly demonstrated an actual expectation of privacy, and short of building a giant dome, there was little else the company could have done to protect itself against this vertical intrusion.

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[11] Enlargements of these photographs were hung on an office wall in EPA's Regional Office in Chicago. *See* Petitioner's Brief on the Merits at 12.

B. Detailed Aerial Photographs of Commercial Facilities Are Unreasonably Intrusive.

The Sixth Circuit's decision that an open-air commercial facility can have no reasonable expectation of privacy from aerial photography ignores the intrusiveness of the government's action in this case. There is no comparison between a mere "aerial observer" and the kind of government surveillance at issue here. EPA's aerial photography of the Dow plant is more akin to telescopic and telephoto surveillance techniques than it is to unaided observation from a public place. *Compare United States* v. *Taborda*, 635 F.2d 131 (2d Cir. 1980) and *United States* v. *Kim*, 415 F. Supp. 1252 (D. Hawaii 1976) *with Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974). Commercial airplanes do not make repeated runs over open-air plants. Nor do they use floor-mounted aerial mapping cameras to photograph a plant's inner workings. Contrary to the Sixth Circuit's decision, government surveillance and aerial photographs that depict minute details of commercial facilities are unreasonably intrusive under the Fourth Amendment.

Nor were these photographs necessary to further federal interests. Other means for obtaining evidence of noncompliance were available to EPA.[12] Furthermore, obtaining judicial oversight will not frustrate EPA's enforcement of the Clean Air Act. Manufacturing facilities, like Dow's Midland plant, can afford neither the production time nor the money it would cost to shut down or otherwise alter their operations to elude government inspections. This Court should not allow a federal agency to circumvent the Fourth Amendment by using inspection techniques which are neither authorized by statute nor supported by the Constitution.

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[12] Dow had earlier provided EPA with schematic drawings of the powerhouses which the Government claims were the focus of its aerial surveillance. And, an EPA inspector could have used a Ringlemann Test (smoke-reader) to detect any air quality violations. *See, Air Pollution Variance Board* v. *Western Alfalfa Corp., supra.*

CONCLUSION

A fully developed open-air commercial facility is not an open field, and is entitled to protection from aerial surveillance under the Fourth Amendment. This intrusive government search violated Dow's reasonable expectation of privacy in the details of its commercial structures. For these reasons, the Chamber of Commerce of the United States and the Mountain States Legal Foundation respectfully urge this Court to reverse the decision below.

Respectfully submitted,

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